UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	**COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE**
Supreme Court:	*Supreme Court:*
D.C. Circuit:	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit:	*Second Circuit:*
Third Circuit: *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980) *Donovan v. National Bank of America, Inc.*, 516 F. Supp. 674, 678 (E.D. Penn. 1981)	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)
Fifth Circuit: *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 981 (W.D. La. 1979) *Matter of Establishment Inspection of Asarco*, 508 F. Supp. 350, 353, (N.D. Tex. 1981)	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit:	*Seventh Circuit:* *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1326 (7th Cir. 1980) (minority opinion on this issue)
Eighth Circuit:	*Eighth Circuit:*
Ninth Circuit: *Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: *Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: *Sarasota Concrete Co.*, 1979 OSHA ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979) *affirmed*, 1981 OSHD 31,527, ¶ 25,360 (OSH Rev. Comm'n., April 28, 1981), *on appeal, Donovan v. Sarasota Concrete Co.*, #81-5621 (11th Cir., *argued* July 1, 1982).*	*OSHA:* OSHA Regulation at 29 C.F.R. § 1903.11

UNDER THE FOURTH AMENDMENT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE
Supreme Court: *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978) *Michigan v. Tyler*, 436 U.S. 499, 507 (1978)	*Supreme Court:*
D.C. Circuit: *Cf. Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981)	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit: *Marshall v. Wollaston Alloys, Inc.*, 479 F. Supp. 1102, 1104 (D. Mass. 1979)	*Second Circuit:*
Third Circuit: *Marshall v. North American Car Co.*, 476 F. Supp 698, 707 (M.D. Penn. 1979), *affirmed*, 626 F.2d 320 (3rd Cir. 1980) *BP Oil, Inc. v. Marshall*, 509 F. Supp. 802, 808 (E.D. Penn. 1981) *Donovan v. Metal Bank of America, Inc.*, 516 F. Supp. 674, 679 (E.D. Penn. 1981) *Marshall v. Berwick Forge and Fabricating Co.*, 474 F. Supp. 104, 113 (M.D. Penn. 1979) *Marshall v. Consolidated Rail Corp.*, 1979 OSHD 29,283, ¶ 24,101 (W.D. Pa. Dec. 13, 1979)	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)
Fifth Circuit: *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 982 n. 4 (W.D. La. 1979) *Matter of Establishment Inspection of Asarco*, 508 F. Supp. 350, 353, (N.D. Tex. 1981)	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit: *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (concurring opinion at 1326; dissenting opinion at 1327) (majority opinion on issue) *Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, 1343 (7th Cir. 1979), *cert. denied*, 444 U.S. 884 (1979) *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 378 (7th Cir. 1979) *Matter of Establishment Inspection of Marson Co., Inc., a Corp.*, 1979 OSHD 28,933, ¶ 23,856 (N.D. Ind., June 21, 1979)	*Seventh Circuit:* *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1324 (7th Cir. 1980) (minority opinion on this issue)
Eighth Circuit: *Marshall v. Central Mine Co.*, 608 F.2d 719, 720 n. 1 (8th Cir. 1979)	*Eighth Circuit:*
Ninth Circuit: *Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: *Marshall v. Wand W Steel Co., Inc.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979) *Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: *Sarasota Concrete Co.*, 1979 OSHD 28,917, ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979)	*OSHA:* OSHA Regulation at 29 C.F.R. § 1903.11

The subsequent history of the administrative law judge's opinion in *Sarasota Concrete Co.* was omitted from the Chart appearing as Exhibit A in Petitioners' initial Petition for Writs of Certiorari in these cases. The administrative law judge's decision was affirmed by the OSH Review Commission with one Commissioner dissenting. The decision of the Review Commission was then taken to the Eleventh Circuit Court of Appeals on a Petition for Review. Although argument was heard on July 1, 1982, no judgment has been rendered by the the Eleventh Circuit.

EXHIBIT B

[¶12,451] OSHA INSTRUCTION ISSUED ON SAFETY AND HEALTH COMPLAINT PROCESSING

Back reference: ¶4014.35.

OSHA *Instruction* CPL 2.12B, issued February 1, 1982, contains revised complaint processing procedures, reflecting a reduction in field staff, which extend the time set for responding and amend the characterization of complaints. Text follows:

Subject: Safety and Health Complaint Processing Procedures

A. *Purpose.* This instruction provides revised guidelines for investigation of complaints concerning alleged unsafe and unhealthful conditions at the workplace.

B. *Scope.* This instruction applies OSHA-wide.

C. *Cancellation.* OSHA Instruction CPL 2.12A, September 1, 1979, Office of Compliance Programming, is canceled. To the extent that the policies and guidelines contained in OSHA Instruction CPL 2.45, Interim Field Operations Manual, Chapters IV and VI, are inconsistent with this instruction, they are revoked.

D. *Action.* Pursuant to Appendix A of this instruction, the Area Director or the safety or health supervisor shall conduct a thorough evaluation of all complaints regardless of the complaint's formality; i.e., whether or not filed in writing by an employee or an employee representative. Such an evaluation will require further contacts with complainants or other employees, their representatives, or other OSHA support staff. But, in no event should a complaint be acted upon until it has been thoroughly evaluated. (See G through J of this instruction.)

E. *Federal Program Change.* This instruction describes a Federal program change which affects State programs. Each Regional Administrator shall:

1. Ensure that this change is promptly forwarded to State designees.

---

*Exhibits B, C, D and E are highlighted in part in red ink.

2. Explain the technical content of this change to the State designee as requested.

3. Ensure, within 30 days of forwarding this instruction, that the State submits:

a. A plan change supplement; or

b. A proposed timetable for adoption of the change; or

c. Reasons why it is not necessary for the State to adopt this change.

4. Ensure that within 6 months of forwarding this instruction, the Federal program change (or its equivalent) is implemented and a plan change supplement is submitted by the State to the Region for review and processing.

F. *Background.*

1. Section 8(f)(1) of the Act requires the Secretary or his authorized representative to "make a special inspection . . . as soon as practicable" if he has "reasonable grounds to believe" that a violation of a safety or health standard that threatens physical harm exists and if that condition has been brought to his attention through a written complaint signed by an employee or his representative. OSHA also recognized the value of complaint information received from informal sources, particularly former employees or current employees who are afraid of retaliation and wish to remain anonymous. In OSHA Instruction CPL 2.12, dated December 1, 1977, OSHA adopted a policy of conducting inspections in response to substantially all complaints, both formal and nonformal.

2. However, the policy of investigating substantially all complaints resulted in large backlogs of complaints, many of which did not deal with serious hazards, and in the diversion of OSHA resources from inspecting workplaces with serious hazards. It became clear that

the policy of investigating all complaints adversely affected OSHA's ability to concentrate its resources to conduct programmed inspections in high hazard areas.

3. Although OSHA continued to recognize the importance of responding to complaints from various sources, the agency issued OSHA Instruction CPL 2.12A on September 1, 1979, which allowed the response to take a variety of forms, ranging from an inspection of a complaint to a response by letter, depending upon the formality of the complaint, the nature of the hazard, and the abatement response of the employer. Through this program, OSHA's resources were again focused on effective and expeditious investigations of high hazard complaints and, through its general schedule and special emphasis programs, inspections of high hazard industries and workplaces.

4. In general, the implementation of CPL 2.12A has been successful. Under these procedures, OSHA has continued to respond by inspection to meritorious formal complaints as mandated by the Act. With respect to nonformal complaints, where there is no statutory inspection requirement, the response of employers to OSHA's letter advising them of the complaint items has been favorable. In most cases, hazards identified in the complaint have been removed by the employer upon notification by OSHA; as a result, employees have been protected without an unnecessary expenditure of inspection resources.

5. OSHA has reevaluated CPL 2.12A in light of the field experience in implementing the directive and believes that some changes are necessary to improve complaint-handling procedures and to provide still greater flexibility in targeting inspection activity. In reevaluating the current directive, OSHA has been mindful of its statutory duty to respond to meritorious formal complaints as well as its responsibility to assure that inspections will, to the maximum extent possible, reach the most hazardous workplaces and thus provide

the greatest amount of protection for employees. Thorough evaluation of all complaints continues to be a critical element of OSHA policy and previous instructions regarding this evaluation are being reemphasized. In addition, in accordance with the requirements of the Act, the identity of all formal and nonformal complainants who wish to remain anonymous will be kept confidential.

6. The following significant changes in CPL 2.12A are being made in this instruction:

a. The time frame for response to serious and nonserious complaints is being slightly modified in light of field resource availability. Under CPL 2.12A OSHA attempted to inspect serious complaints within 3 days and other-than-serious complaints within 20 days. Complaints involving serious hazards now will be inspected within 5 working days; those involving other-than-serious conditions will be inspected within 30 working days.

b. Under CPL 2.12A, if a thorough evaluation of a formal complaint did not establish "reasonable grounds to believe a violation or danger exists," no inspection would have been conducted. The new instruction clarifies the original language by saying that, if the complaint does not establish reasonable grounds to believe that a violation threatening physical harm or an imminent danger exists, no inspection shall be conducted.

c. If the complaint alleges a violation of a standard designed to protect against physical harm and the evaluation leads to the conclusion that no physical harm is threatened, no inspection should be conducted.

d. Under CPL 2.12A, in the case of nonformal complaints, a letter would have been sent to the employer advising him or her of the complaint except in the case of imminent danger conditions or "extremely serious" conditions where

an inspection would have been conducted. The distinction between "imminent danger" and "extremely serious" conditions has been unclear to field staff and has led to confusion. The agency believes that inspections conducted in response to apparent "imminent dangers" will permit OSHA to deal with those situations where there are immediate threats to employee safety or health requiring inspection. Accordingly, the reference to "extremely serious" conditions has been deleted.

e. Under CPL 2.12A the scope of inspections of high rate industries was generally the entire facility; in the case of low rate industries, only the working conditions identified in the complaint would have been inspected. That basic approach will be continued in this instruction; however, changes are being made consistent with the new targeting instruction, CPL 2.25B.

f. Pursuant to CPL 2.12A, safety and health complaints filed by former employees who also alleged that they were unlawfully discharged in violation of Section 11(c) of the Act were treated as formal complaints if they otherwise satisfied the requirements of a formal complaint. After evaluating this procedure, it has been determined that, consistent with statutory language, it would be more appropriate to treat such complaints as nonformal unless subsequently referred for inspection by the 11(c) supervisory investigator.

G. *Evaluating Complaints.* A careful exercise of investigatory techniques is necessary for complete evaluation of all complaints. Only supervisory personnel shall evaluate complaints. All evaluation decisions shall be fully documented in the establishment case file, including all information obtained pursuant to the procedures outlined in Appendix A of this instruction. All incoming complaints shall be referred to a designated professional who shall obtain all

available information from the complainant. The complaint shall thereafter be forwarded to the supervisor to complete the evaluation.

1. When a complaint alleges both safety and health hazards, the complaint should be referred to both safety and health supervisors for evaluation. They shall coordinate the handling of the complaint. Supervisors should maximize the use of cross-trained CSHO's to conduct complaint inspections involving both safety and health hazards.

2. An employee or employee representative shall be informed of the right to file a formal complaint in writing pursuant to Section 8(f)(1) and of his/her right, as a matter of law and OSHA policy, to have the identity held confidential, if requested, regardless of the formality of the complaint.

3. The complainant shall be informed that formal complaints generally lead to workplace inspections while nonformal complaints usually result in letters requesting employers to undertake corrective action.

4. If a complainant, filing orally, makes a request to formalize the complaint, the supervisor or designated professional, after confirming that the complainant is indeed an employee or employee representative, shall complete the Complaint, OSHA-7 Form, to the extent possible prior to mailing for complainant's signature. (See Appendix B, letter #5.) If the signed complaint form is not returned within 10 working days, it shall be treated as a nonformal complaint and a letter shall be sent to the employer. If a signed complaint is received after 10 working days but before a letter has been sent to the employer, the complaint is to be considered formal and evaluated as such.

5. If a complainant filing orally declines to formalize his complaint, the supervisor or designated professional shall nevertheless attempt to obtain the complainant's name, address, and telephone number.

6. The complainant shall be advised of the protection against discrimination afforded by Section 11(c) of the Act and shall be informed of the procedure for filing an 11(c) complaint.

7. Safety and/or health complaints filed by former employees who allege that they were fired for exercising their rights under the Act are nonformal complaints and will not be scheduled for investigation but will rather be referred (with no letter to the employer until after review of the complaint by the 11(c) supervisor) as appropriate for investigation of the alleged 11(c) discrimination complaint. In those instances where the 11(c) supervisory investigator determines that the existence or nature of the alleged hazard is likely to be relevant to the resolution of the 11(c) discrimination complaint, he may refer the matter to the Area Director for an OSHA inspection. Any 11(c) complaint alleging an imminent danger, however, shall be handled in accordance with the instructions given in H.1.a.

H. *Responding to Formal Complaints.* All formal complaints meeting the requirements of Section 8(f)(1) of the Act and 29 CFR 1903.11 shall be scheduled for workplace inspections. Section 8(f)(1) requires the agency to inspect formal complaints where there are "reasonable grounds to believe" that a violation of a standard that threatens physical harm or an imminent danger exists. Upon completion of the inspection, the complainant shall be informed by letter as to the results. (See Appendix B, letter #6.)

1. *Priorities for Responding by Inspections to Formal Complaints.* Inspections resulting from formal complaints shall be conducted according to the following priority:

a. *Imminent Danger.* Any complaint which, in the professional opinion of the Area Director or designee, constitutes an imminent danger as defined in the FOM, Chapter IX, shall be inspected irrespective of whether or not it meets the

formality requirements of Section 8(f)(1). It shall be inspected the same day received where possible but not later than the employer's next working day after receipt of the complaint.

b. *Formal Complaints.* Formal complaints, other than imminent danger, will be given a priority based upon the classification and the gravity of the alleged hazards as defined in the FOM, Chapters VIII and XI. Complaints involving potentially serious hazards shall be investigated within 5 working days; those involving other-than-serious conditions within 30 working days.

2. *Circumstances Under Which No Inspection of a Formal Complaint Will be Conducted.* Only under the following exceptional circumstances would a formal complaint not result in an inspection. Instead, the Area Director shall inform the complainant by letter (certified with return receipt requested) that no inspection is warranted (with supporting reasons) and that he or she has a right to appeal this decision. (See Appendix B, letter #1.)

a. A thorough evaluation of a complaint does not establish reasonable grounds to believe that a violation threatening physical harm or an imminent danger exists; e.g., if the complaint alleges a condition which is not covered by a standard or, in the case of a serious hazard, by the general duty clause [5(a)(1)] or if the complaint is so vague and unsubstantiated that the Area Director is unable to make a reasonable judgment as to the nature of the alleged work-place hazard.

b. The complaint concerns a workplace condition which has no direct relationship to safety or health or does not threaten physical harm.

c. As a result of a recent inspection or on the basis of other objective evidence, the Area Director determines that the hazard which is the subject of the complaint is not present or has been corrected.

d. The complaint clearly does not fall within OSHA's jurisdiction, e.g., a complaint which involves conditions inside a mine. In such a circumstance the complaint shall promptly be referred to the appropriate agency.

I. *Responding to Nonformal Complaints.* The procedures described below include a variety of responses to nonformal complaints designed to assure correction of hazards identified in the complaint.

1. *Responding by Letter to Nonformal Complaints.*

a. Upon receipt and evaluation of a nonformal complaint and subject to the exceptions in I.2.b. and I.3, the Area Director or designee, as soon as possible, shall prepare a letter to the employer advising him of the complaint, informing him of the standards allegedly violated (including copies of such standards), and outlining the corrective action required. (See Appendix B, letter #2.) This letter shall be sent by certified mail, with return receipt requested.

b. The employer shall be requested to post copies of OSHA's letter of notification referred to in the previous subparagraph together with all subsequent correspondence dealing with the complaint items, including the employer's response.

c. Concurrent with the letter to the employer, a letter to the complainant shall be prepared explaining that the employer has been informed of the complaint and requesting the complainant to notify the Area Director if no corrective action has been taken or initiated within 30 calendar days (or less if so indicated in the letter to the employer) or if any adverse or discriminatory action or threats are made against the complainant. A copy of the letter to the employer shall be included with the letter to the complainant. (See Appendix B, letter #3.)

d. If a response is received from the employer and it appears that appropriate corrective action has been taken or that no hazard is present, the case file should be closed. The complainant shall be informed of all responses received from the employer. (See Appendix B, letter #4.)

2. *Responding by Inspection to Nonformal Complaints.*

a. Where the employer fails to respond or submits an inadequate response within the period specified in the letter or where the complainant informs OSHA that no corrective action has been taken, the Area Director or his or her designee shall contact the employer to determine what action he plans to take. If no action has been taken and none is planned, the nonformal complaint shall be activated for inspection pursuant to the priorities outlined in H.1.b. Where an ambiguity exists or where the employer has a correction plan which he has not yet had time to implement fully, the Area Director shall communicate further, as appropriate, with the employer and/or the complainant to determine whether the hazard has been corrected and/or what interim protective steps have been taken until its correction has been completed. On the basis of information available, the Area Director will decide whether an inspection is warranted.

b. The procedures outlined in I.1.a involving responses to nonformal complaints by letter shall not be followed where the nonformal complaint involves an imminent danger situation. Rather the procedures indicated in H.1.a. will be followed.

c. Where employers have sent satisfactory corrective action letters, the Area Director shall, nevertheless, select every tenth letter for inspection to assure that the employer's action corresponds to that asserted in his letter. Only satisfactory letters (coded "7" on the OSHA-32, item 12) shall be

included in this procedure. Letters shall be numbered in order of receipt by the Area Office. Employers shall be informed that they are subject to such "tenth letter" inspections.

3. *Circumstances Under Which Nonformal Complaints Will Result in Neither a Letter nor an Inspection.* In those instances where, after a thorough evaluation, a nonformal complaint falls into the categories outlined in H.2, no inspection shall be conducted and no letter shall be sent to the employer. The case will be closed on the grounds that no valid complaint was received. There will be no need to notify the complainant in such cases.

J. *Scope of Inspection*

1. Except as indicated below, the inspection of a safety complaint shall normally be a comprehensive inspection of the entire workplace (except for low-hazard areas, such as office areas). The following guidelines shall be followed in determining exceptions:

a. In a high rate manufacturing establishment (one whose primary SIC code is listed on the Area Office establishment list), an injury records review, as outlined in OSHA Instruction CPL 2.25B, Appendix D, shall be performed. If such a records review would not have resulted in a comprehensive safety inspection under the guidelines of CPL 2.25B, the procedures given in J.3 for a complaint inspection in a low rate industry shall apply.

b. If one of the deletion criteria given in CPL 2.25B, I.1.a(2)(b) applies to a general industry establishment, the procedures in J.3 shall apply.

c. In the construction and maritime industries, if a substantially complete inspection of the establishment has been conducted within the last quarter, the procedures in J.3 shall apply.

2. The inspection of a health complaint in a SIC code industry that is listed on the Health Inspection

Plan will normally be a comprehensive inspection of all areas where a potential serious health problem may exist. Otherwise the procedures outlined in J.3 for a complaint in a low rate industry shall apply.

3. Generally, a complaint inspection in a low-hazard industry should be limited to working conditions identified in the complaint. If, however, the CSHO believes that the scope of the inspection should be expanded because of information indicating the likelihood of serious hazards in other portions of the plant (e.g., because the CSHO has observed them prior to the opening conference or because the records review shows that an unusual number or type of injuries has occurred in one time period, area, or operation) or because of a formal complaint alleging imminent danger or serious hazards received while conducting the inspection, he or she shall contact the Area Director or supervisor. A decision will then be made on the basis of the information that is available whether the inspection should be extended. Whenever such an expanded inspection is to be conducted, the CSHO shall advise the employer and the employee representative of the expanded scope at the opening conference or at the earliest opportunity.

4. Any departure from the scope guidelines given in J of this instruction shall be supported by adequate documentation.

[Appendix omitted]

EXHIBIT C

¶ 11,743 OSHA INSTRUCTION ISSUED ON EMPLOYEE VIOLATION COMPLAINT PROCESSING

Back reference: ¶ 4049.

OSHA *Instruction* CPL 2.12A cancels Instruction CPL 2.12 and creates new guidelines for the processing of employee complaints. Text is as follows:

Subject: Safety and Health Complaint Processing Procedures

A. *Purpose.* This instruction provides guidelines for investigation of complaints concerning alleged unsafe and unhealthful conditions at the workplace.

B. *Scope.* This instruction applies OSHA-wide.

C. *Cancellation.* OSHA Instruction CPL 2.12, December 1, 1977, Office of Compliance Programming, is canceled. To the extent that the policies and guidelines contained in Chapters IV and VI of the Field Operations Manual (FOM) are inconsistent with this instruction, they are revoked.

D. *Action.* Pursuant to Appendix A of this instruction, the Area Director or the safety or health supervisor shall conduct a thorough evaluation of all complaints regardless of the complaint's formality; i.e., whether or not filed in writing by an employee or his representative. An evaluation may require further contacts with complainants or other employees, their representatives, or other OSHA support staff. But, in no event should a complaint be acted upon until it has been thoroughly evaluated. (See paragraph G. through K. of this instruction.)

E. *Federal Program Change.* This instruction describes a Federal program change which affects State programs. Each Regional Administrator shall:

1. Ensure that this change is promptly forwarded to State designees.

2. Explain the technical content of this change to the State designee as requested.

3. Ensure, within 30 days of the forwarding of this instruction, that the State submits:

a. A plan change supplement; or

b. A proposed timetable for adoption of the change; or

c. Reasons why it is not necessary for the State to adopt this change.

4. Ensure that within 6 months of the forwarding of this instruction, the Federal program change (or its equivalent) is implemented and a plan change supplement is submitted by the State to the Region for review and processing.

F. *Background.* Section 8(f)(1) of the Act requires the Secretary or his authorized representative to "make a special inspection...as soon as practicable," if he has "reasonable grounds to believe" that a violation or danger exists, which has been brought to his attention through a written complaint filed by an employee or his representative. In addition to investigating all such formal complaints, OSHA has recognized the value of complaint information received from informal sources, particularly former or current employees who are afraid of retaliation and wish to remain anonymous. Thus, nonformal complaints include oral complaints filed by employees, written and oral complaints filed by nonemployees such as public interest groups and all other miscellaneous information forwarded informally to Area Offices. Accordingly, in various Field Information Memorandums and Program Directives, culminating in OSHA Instruction CPL 2.12, dated December 1, 1977, OSHA adopted a policy of conducting inspections in response to substantially all formal and nonformal complaints.

1. However, the policy of investigating substantially all complaints has resulted in large backlogs of complaints, many of which do not deal with serious hazards, and the diversion of OSHA resources from inspecting workplaces with serious hazards. It has

become clear that the emphasis on investigating all complaints has adversely affected OSHA's ability to concentrate its resources in high hazard areas to conduct programmed inspections as outlined in OSHA Instruction PAE 1.1. This conclusion was reinforced by the General Accounting Office's (GAO) report to the Congress, dated April 9, 1979, criticizing the agency's policy of responding to substantially all complaints. Specifically, the GAO study disclosed numerous complaints which resulted in comparatively few serious violations related to the complained-of-hazards. In addition, while recognizing the importance of promptly responding to complaints, the Senate Report on the complaint provision of the OSH Act underscored the necessity of balancing OSHA's multiple priorities: "By requiring that the special (complaint) inspection be made 'as soon as practicable,' the committee contemplates that the Secretary, in scheduling the special inspection, will take into account such factors as the degree of harmful potential involved in the condition described in the request and the urgency of competing demands for inspectors arising from other requests or regularly scheduled inspections."

2. OSHA continues to recognize the importance of responding to complaints from various sources. However, under this instruction the agency's response will take a variety of forms, ranging from an inspection of a complaint to a response by letter, depending upon the formality of the complaint, the nature of the hazard and the abatement response of the employer. The key to the success of this complaint-responsiveness program is the effective, professional screening and evaluation of formal and nonformal complaints to determine the nature and severity of the hazard; the number of employees potentially exposed; and any injuries, illnesses, or symptoms attributable to the hazard. Through this program, OSHA's resources will be focused on a more effective and expeditious investigation of high hazard complaints and,

through its general schedule and special emphasis programs, inspection of high hazard industries and workplaces.

3. Finally, in accordance with FOM instructions, the identity of all formal and nonformal complainants who wish to remain anonymous will be kept confidential pursuant to Section 8(f)(1) of the Act and the informer's privilege. Moreover, the careful evaluation of all 8(f) and 11(c) complaints by Area Directors and Operations Review Officers for discrimination and safety or health implications, respectively, and the prompt forwarding of all such complaints to the appropriate action office shall continue pursuant to existing OSHA policy. Nothing in this instruction shall be construed as a de-emphasis of the importance of 11(c) complaint processing. Discrimination complaints will continue to be processed in accordance with Chapter XV of the FOM and current instructions (OSHA Instructions DIS .1 and DIS .2).

G. *Evaluating Complaints.* A careful exercise of investigatory techniques is necessary for complete evaluation of all complaints. Only supervisory personnel shall receive and evaluate complaints pursuant to the instructions in Appendix A. All information obtained in the evaluation of complaints shall be recorded and placed in the establishment case file. If, on rare occasions, the appropriate supervisor is unavailable the complainant shall be immediately referred to a designated professional who shall obtain all available information from the complainant. The complaint should thereafter be forwarded to the supervisor, who should attempt to contact the complainant for any additional information necessary to complete the evaluation.

1. When a complaint alleges both safety and health hazards, the complaint should be referred to both safety and health supervisors for evaluation. They shall coordinate the handling of the complaint. Supervisors should maximize the use of cross-trained CSHO's to conduct complaint inspections involving both safety and health hazards.

2. The complainant should be encouraged to file a formal complaint in writing pursuant to Section 8(f)(1), and should be informed that, as a matter of law and OSHA policy, a complaintant's [*sic*] identity will remain confidential, if requested, regardless of the formality of the complaint. The complainant should also be informed that, subject to the exceptions described in paragraph H.2., formal complaints generally lead to workplace inspections, while nonformal complaints may result in letters requesting employers to undertake abatement action, with the exceptions described in I.2.

3. The complainant shall be advised of the protection against discrimination afforded by Section 11(c) of the Act and shall be informed of the procedure for filing an 11(c) complaint.

4. If a complainant declines to file a formal complaint, the supervisor shall attempt to obtain the complainant's name, address and telephone number.

5. If an employee or employee representative agrees to file a formal complaint, the supervisor shall complete the "Complaint," OSHA-7 Form, to the extent possible, prior to mailing for complainant's signature. (See Sample letter #5.) If the complaint is not returned within 10 calendar days, it shall be treated as a nonformal complaint.

6. Safety and health complaints filed by former employees who allege that they were fired for exercising their rights under the Act shall be investigated as formal complaints and copies of these complaints shall be referred to the appropriate office for investigation of the alleged 11(c) discrimination complaint.

H. *Responding to Formal Complaints.* All formal complaints meeting the requirements of Section 8(f)(1) of the Act and 29 CFR 1903.11 shall result in workplace inspections. Section 8(f)(1) requires the agency to inspect formal complaints where there are "reasonable grounds to believe" that a violation or danger exists, without regard to the motive of the

complainant. A letter shall be promptly sent to the complainant acknowledging receipt of the formal complaint and indicating that an inspection of the complained of conditions will be scheduled. (See Sample letter #6.)

1. *Priorities for Responding by Inspections to Formal Complaints.* Inspections resulting from formal complaints shall be conducted according to the following priority:

a. *Imminent Danger.* Any complaint, which in the professional opinion of the Area Director or his designee constitutes an imminent danger as defined in the FOM, Chapter IX, shall be investigated the same day received where possible but not later than 24 hours after receipt of the complaint.

b. All other complaints will be prioritized based upon the gravity of the hazards as defined in the FOM, Chapters VIII and XI. Those complaints involving potentially serious hazards should be investigated within 3 working days; those involving other conditions should be investigated within 20 working days.

2. *Circumstances Under Which No Inspection of a Formal Complaint Will be Conducted.* Only under the following exceptional circumstances would a formal complaint not result in an inspection. Instead, the Area Director shall inform the complainant by letter that no inspection is warranted, the reasons therefor, and that he has a right to appeal this decision. (See Appendix B, Sample Letter #1.)

a. A thorough evaluation of a complaint does not establish "reasonable grounds to believe a violation or danger exists"; i.e., if the complaint is so vague and unsubstantiated that the Area Director is unable to make a reasonable judgment as to the nature of the workplace hazard.

b. The complaint concerns a workplace condition which has no direct or immediate relationship to safety or health.

c. As a result of a recent inspection or on the basis of other objective evidence, the Area Director determines that the hazard which is the subject of the complaint is not present or has been corrected.

d. The complaint clearly does not fall within OSHA's jurisdiction, such as a complaint involving conditions inside a mine. Under such circumstances, the complaint should promptly be referred to the appropriate agency.

I. *Responding to Nonformal Complaints.* The procedures described below include a variety of alternative responses to nonformal complaints designed to assure abatement of hazards identified in the complaint.

1. *Procedures for Responding by Letter to Nonformal Complaints.*

a. Upon receipt and evaluation of a nonformal complaint, and subject to the exceptions in paragraph I.3, the Area Director or designee, as soon as possible, shall prepare a letter to the employer advising of the complaint and of the action required. (See Appendix B, Sample Letter #2.) These letters shall be sent by registered mail, return receipt requested.

b. Concurrent with the letter to the employer, a letter to the complainant shall be prepared explaining that the employer has been informed of the complaint and requesting the complainant to notify the Area Director if no corrective action has been taken within 30 calendar days (or less if so indicated in the letter to the employer) or if any adverse or discriminatory action or threats are made against the complainant. A copy of the letter to the employer shall be included with the letter to the complainant. (See Appendix B, Sample Letter #3.)

c. If a response is received from the employer and it appears that appropriate corrective

action has been taken, or that no hazard is present, the case file should be closed, subject to random followup inspections as described in paragraph I.2.b. The complainant shall be informed of all responses received from the employer. (See Appendix B, Sample Letter #4.)

2. *Procedures for Responding by Inspection to Nonformal Complaints.*

a. Where the employer fails to respond or submits an inadequate response within the period specified in the letter (See paragraphs I.1.a.-b.), or if the complainant informs OSHA that no corrective action has been taken, the nonformal complaint shall be activated for inspection pursuant to the priorities outlined in paragraph H.1.b. However, where an ambiguity exists, the Area Director may communicate further with the employer or complainant to determine whether the hazard has been fully corrected. Failure of the employer to correct a hazard called to his attention by letter could result in the issuance of a willful citation pursuant to Chapter XI of the FOM.

b. Where employers have sent satisfactory abatement letters, the Area Director shall nevertheless select for a followup inspection every tenth letter of these nonformal complaints. The followup inspection should be performed in accordance with paragraph K. within 30 days of receipt of the employer's letter.

c. The procedures outlined in paragraph I.1.a., involving responses to nonformal complaints by letter, shall not be followed where the nonformal complaint involves *an imminent danger* or an *"extremely serious working condition"* or where other special circumstances arise. These nonformal complaints shall be evaluated and scheduled for an inspection within 24 hours. Examples of "extremely serious working conditions" include: (a) lack of

perimeter guarding on a high floor of a building to which a large number of employees are exposed or (b) an exposure to a toxic substance under conditions which strongly suggest a hazard likely to result in serious health effects, such as exposure to high lead concentrations without the use of respirators.

3. *Circumstances Under Which Nonformal Complaints Will Result in Neither a Letter nor Inspection.* In those instances where, after a thorough evaluation, a nonformal complaint falls into the categories outlined in paragraphs H.2. no inspection shall be conducted and no letter shall be sent to the employer. The case will be closed on the grounds that no actionable complaint was received, and a letter to that effect shall be sent to the complainant. (See Appendix B, Sample letter #7.)

J. *Responding to Complaint Backlog.* All currently pending complaints shall be evaluated and processed pursuant to paragraphs G., H., and I. Prior to conducting an inspection of a complaint which is more than 20 working days old, the complainant should be contacted, where possible, to determine the current status of the complaint hazard. If the complainant responds that the hazardous working condition has been corrected, or is otherwise not present at the worksite, the case should be closed and the complaint logs should be adjusted. A confirming letter should be sent to the complainant stating that no inspection will be conducted and the case will be closed because the condition is no longer present. (See Appendix B, Sample Letter #8.) With regard to the complaints requiring inspections, if the safety or health backlogs exceed 5 times the number of available CSHO's to conduct the safety or health inspections, respectively, the Area Director shall advise the Regional Administrator, who should make available resources to the maximum practical extent considering the number and severity of the backlog complaints.

K. *Scope of Inspection.* The inspection of a complaint in a high-hazard industry should generally extend to the entire facility and should not be limited to the complained-of working condition. **Generally, a complaint inspection in a low-hazard industry should be limited to working conditions identified in the complaint. However, if the CSHO believes, on the basis of information indicating the likelihood of hazards in other portions of the plant, that the scope of the inspection should be expanded in a low-hazard industry, he should contact the Area Director or appropriate supervisor. A decision will then be made on the basis of the information whether the inspection should be expanded and the extent to which the inspection should be extended. Whenever such expanded inspections are conducted, the CSHO shall advise the employer and the employee representative of the expanded scope at the opening conference or at the earliest opportunity.** The principal reasons for conducting full-scope inspections when responding to complaints in high-hazard industries are: (1) agency experience indicates that complaint inspections result in the discovery of at least as many hazards not related to the complaint as are related to the complained-of working conditions; and (2) efficient utilization of agency resources. **The time spent traveling to and from the workplace or in opening and closing conferences must be expended regardless of the scope of the inspection. While these factors would also be applicable in low-hazard industries the agency has determined that in the case of high-hazard industries, which are specially targeted for OSHA enforcement, there is a greater likelihood that a full-scope inspection will disclose serious hazards, thus justifying the additional expenditure of agency resources involved.**

[Appendix omitted]

OSHA Instruction CPL 2.12

Subject: Employee Complaint Processing Procedures

1. *Purpose*

The purpose of this directive is to provide guidelines and procedures for the scheduling, review and investigation of complaints concerning alleged unsafe and unhealthful conditions at the workplace.

2. *Documentation Affected*

This directive supplements the policies and guidelines in the OSHA Field Operations Manual (FOM), Chapters IV and VI. Field Information Memorandum (FIM) #76-20, Subject: Complaint Processing, is hereby canceled. In addition, any memorandums or bulletins from the National Office and the Regional Offices to the field which adversely impact the requirements of this directive shall be appropriately modified.

3. *Background*

a. Field Information Memorandum #76-9 dated March 5, 1976, was issued to ensure that a systematic, technical review of Sections 8(f) and 11(c) (of the Act) complaints was made with the intent of recognizing possible safety and health hazard ramifications in 11(c) complaints and conversely to ensure prompt inspection where there appeared to be safety or health hazards without regard to the formality requirements of Section 8(f).

b. Field Information Memorandum #76-20 dated July 2, 1976, replaced FIM #76-9. It provided instructions for issues not covered in FIM #76-9 as well as clarification of other items.

c. Field Information Memorandum #76-20 significantly increased the complaint workload in the field. The number of complaints received and investigated in some regions overtaxed the resources available. This burden introduced complaint backlogs, reduced inspection activity at some field offices in several important safety and health programs and severely decimated planned regional inspection programs.

4. *Explanation*

This directive implements guidelines that represent consensus procedures arrived at by the Regional Administrators, their staffs and the National Office. The guidelines are directed at the prompt and timely receipt and processing of all complaints alleging the existence of safety and health hazards in a workplace. It includes all complaints whether or not such complaints meet the formality requirements of Section 8(f)(1) of the Act. The judicious use of this directive should facilitate timely response and investigation of complaints in the field.

5. *Action*

All complaints, regardless of source or method of receipt, shall be reviewed and evaluated by the Area Director, or designated professional, for (1) possible safety and health implications; (2) determination of classification as imminent danger, serious or other than serious; and (3) scheduling of investigation. The anonymity of all complainants shall be protected under the provisions of Section 8(f)(1) of the Act. Discrimination complaints, Section 11(c) of the Act, will be processed in accordance with Chapter XV of the FOM and current directives. Area Directors shall not construe anything in this directive as a de-emphasis of 11(c) complaint processing. Area Directors and Operations Review Officers shall continue to emphasize thorough reviews of both 8(f) and 11(c) complaints for safety and health and discrimination aspects, and assure prompt forwarding of such complaints to the appropriate action office.

a. *Imminent danger.*

Any complaint, regardless of source, which in the professional opinion of the Area Director or designee may constitute imminent danger, shall be investigated within 24 hours as outlined in the Field Operations Manual (FOM), Chapter IX.

b. *Serious.*

The determination as to whether the complaint represents serious hazards will be made by the Area Director or designee using the procedures in the FOM, Chapter VIII. After determining that the alleged hazardous condition may

be serious, the Area Director should then establish the schedule for investigation based on professional judgment of the gravity of the hazard. In making this judgment, the Area Director should consider the folowing:

- *Severity of Possible Injury or Illness*

  Safety:

  —Death or permanent disability.

  —Loss of sight.

  —Amputations: Arm or leg, hand or foot, finger or toe.

  —Temporarily disabling injuries.

  Health:

  —Cancer.

  —Chronic (cumulative) toxicity.

  —Acute systemic toxicity.

  —Hearing loss.

  —Nervous system disturbances.

  —Respiratory effects.

  —Hematologic (blood) disturbances.

  —Irritation of eye, nose, throat.

- *Probability of Injury or Illness Occurring*

  —High.

  —Moderate.

  —Low.

(1) Serious complaints shall be assigned for investigation immediately after imminent danger and fatality/catastrophe investigations, as designated in the FOM, Chapter IV.

(2) All investigations of serious complaints must be initiated within *3* working days or appropriate justification for delay will be entered on the log. If a backlog of serious complaints exceeding *7* working days persists for 20 working days (total of 27 days), the Area Director shall advise the Regional Administrator. The Regional Administrator shall utilize available resources to

the maximum extent practical and, if necessary, notify the Field Coordinator and seek appropriate assistance to eliminate the backlog.

(3) Normally, if time and resources permit, the inspection should cover not only violations and dangers alleged in the complaint but the entire establishment of the employer. If there has been a very recent inspection, and the CSHO assures himself that a complete inspection is not necessary, only a partial inspection may be made. However, if the CSHO has reason to believe that similar conditions exist in areas of an establishment other than those areas initially brought to his attention in the complaint, he shall broaden the inspection to include such areas. In each case, the CSHO shall advise the employer of any increase in scope of the inspection at the opening conference or at the earliest possible opportunity.

c. *Other than serious.*

All complaints determined to be other than serious shall be categorized as "formal" or "nonformal" complaints. Complaints received from employees and/or their authorized representatives, meeting the specified requirements of Section 8.(f)(1) [*sic*] of the Act, shall be categorized as "formal"complaints. All other complaints, regardless of source (including those from alleged employees and/or representatives who refuse to sign the "Complaint," OSHA-7 Form, or other acceptable document or letter), shall be categorized as "nonformal" complaints.

(1) *Formal.*

Formal complaints shall be assigned for investigation immediately after fatality/catastrophe and serious complaint investigations. Inspections for other than serious complaints made as the result of a formal complaint should be accomplished within *20* working days of receipt. Reports to the Regional Administrator on complaint backlogs should be submitted on a fixed periodic sequence twice a month. Negative reports are encouraged. Regional Administrators are authorized to reduce this requirement to once a month provided procedures are established that prevent unanticipated

accumulations. The scope of the inspection shall be the same as that for a serious determination. (See Paragraph 5.b.)

(2) *Nonformal.*

Inspections made as the result of a "nonformal" complaint should be accomplished within *20* working days of receipt. Nonformal complaints which have not been investigated within a total of *30* working days may, at the discretion of the Area Director, trigger employer participation in the form of a letter request to the employer. At the discretion of the Area Director, with appropriate Regional Office consultation, the letter may be sent on an earlier date. (See instructions in paragraph 5.c.(2)(b).) All inspections initiated as the result of a nonformal complaint shall normally be limited to the areas addressed in the complaint. The employer shall be informed of the two categories of complaint inspections — "formal" and "nonformal." The employer shall be informed that it is our policy to respond to all information concerning safety and health hazards, for the protection of employees and the benefit of employers, and that the information has been thoroughly evaluated by senior safety and health professionals prior to scheduling of the inspection. If information concerning an imminent danger situation or serious violation is noted by the CSHO or brought to the CSHO's attention, appropriate action in accordance with the Act must be taken. The employer's representative will be advised as soon as any such conditions are noted.

(a) *Reevaluation.*

All nonformal complaints which have not been investigated within *40* working days from receipt shall be reevaluated. Action will be taken to determine if the unsafe/unhealthful condition still exists; e.g., contact complainant, if known, employee representative, or any other available

source having knowledge of the workplace conditions. The reevaluation also shall include consideration of the applicability of the particular industry's incident rate or current OSHA special requirements for the industry. If the Area Director determines the complaint does not merit investigation or a letter to the employer, send a letter to the complainant, if known, explaining this. Make a note in the case file and log and close the case. If the complainant is not known, note the explanation in the case file and log and close the case. If the Area Director determines that the complaint should be investigated:

(i) Reschedule the investigation. Consideration shall be given to the current priorities established by the National Office; e.g., high hazard industries, specific health areas, etc. If the employer is in one of these categories, the investigation shall be conducted in accordance with the priorities for that category. If not, reschedule the investigation within the other appropriate inspection category.

(ii) Write explanatory letter to complainant, if known, indicating an investigation will be initiated at a later date.

(b) *Letter to employer.*

If the Area Director realizes that it is unlikely the complaint investigation can be scheduled within 20 working days, he may determine that a letter to the employer is appropriate, and it should be prepared and forwarded. The letter shall advise the employer of the complaint particulars. The employer shall be asked to investigate the alleged conditions and to report to the Area Office the results of the investigation and the action taken (when applicable). The letter shall

also advise the employer of the assistance available; and, inform the employer that an inspection *may* be conducted at some future date. Write a letter to the complainant, if known, advising the complainant of the action taken. A copy of the letter to the employer may be enclosed. The complainant should be asked to notify the Area Director if no corrective action is taken, or if any adverse or discriminatory action is taken against the complainant.

(c) *Complaint log.*

A log of complaints shall be maintained in the OSHA Area Office receiving the complaint. In the event that the complaint is transmitted from the receiving office to another office or agency for action, review or information, the log will indicate a record of the transmittal. The log will also indicate disposition of the complaint. This shall include the fact that an inspection was scheduled and conducted, indicating the date. In the event a decision is made not to conduct an inspection, an explanation will be entered.

6. *Effective Date*

This directive is effective immediately and will remain in effect until canceled or superseded.

EXHIBIT E

OSHA Regulation 29 C.F.R.

§ 1903.11 Complaints by employees.

(a) Any employee or representative of employees who believe that a violation of the Act exists in any workplace where such employee is employed may request an inspection of such workplace by giving notice of the alleged violation to the Area Director or to a Compliance Safety and Health Officer. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the employer or his agent by the Area Director or Compliance Safety and Health Officer no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record publishers, released, or made available by the Department of Labor.

(b) If upon receipt of such notification the Area Director determines that the complaint meets the requirements set forth in paragraph (a) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the complaint.

(c) Prior to or during any inspection of a workplace, any employee or representative of employees employed in such workplace may notify the Compliance Safety and Health Officer, in writing, of any violation of the Act which they have reason to believe exists in such workplace. Any such notice shall comply with the requirements of paragraph (a) of this section.

(d) Section 11(c)(1) of the Act provides: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."